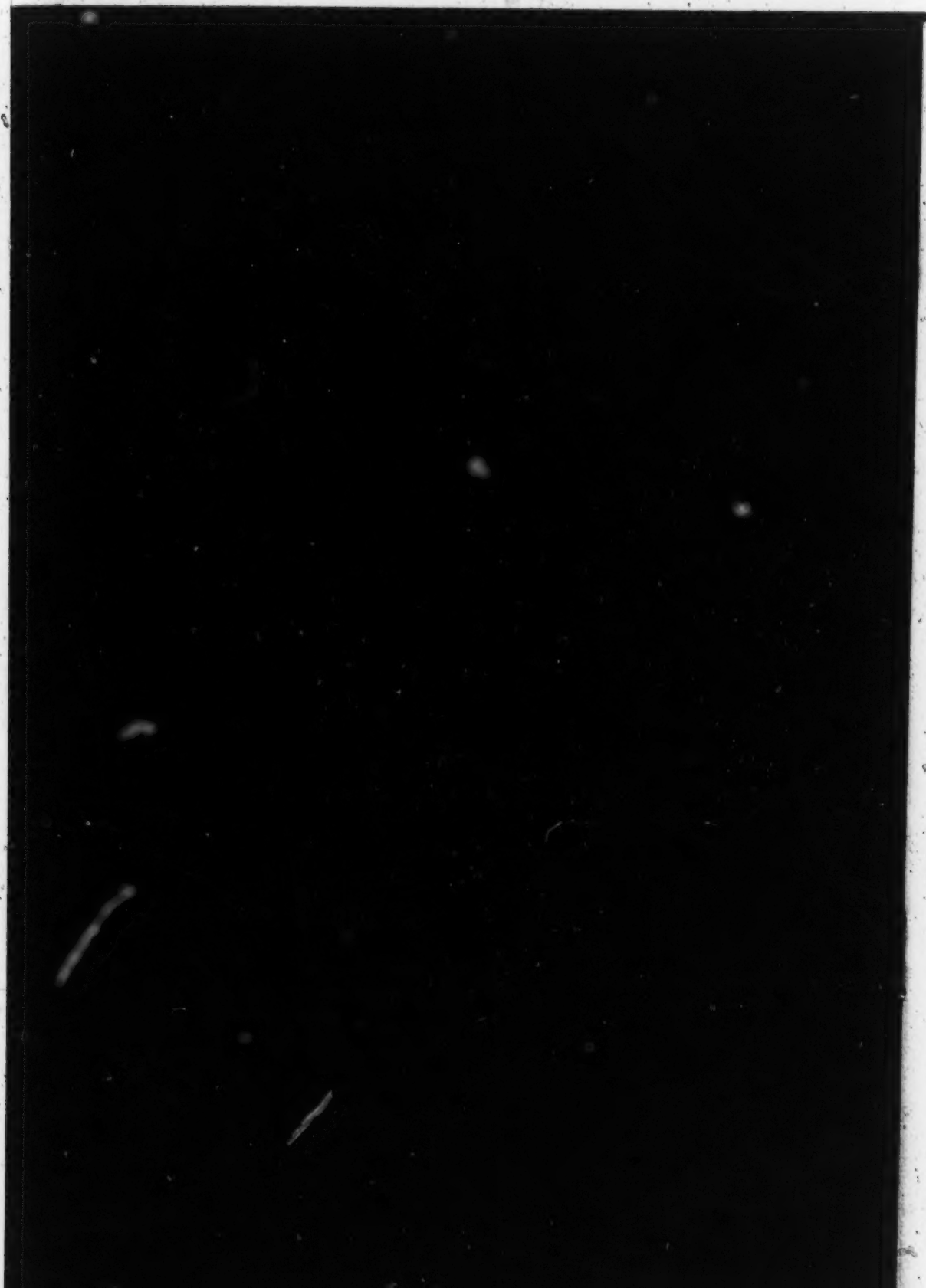

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 384

WALTER GERMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This proceeding involves an adjudication of civil contempt against petitioner, Walter Germann, a resident and citizen of Switzerland. Mr. Germann died on April 10, 1967, prior to the filing of the petition.[1] After a hearing in the United States District Court for the Southern District of New York on August 15,

[1] A judgment for civil contempt does not abate by reason of the death of the defendant. *Wasserman* v. *United States*, 161 Fed. 722 (C.A. 8), reversed per sipulation, 166 Fed. 1022 (C.A. 8; *Howard* v. *Wilbur*, 166 F. 2d 884, 885 (C.A. 6); see *Pino* v. *United States*, 278 Fed. 479 (C.A. 7); 4 Barron & Holtzoff, *Federal Practice and Procedure* § 2428, p. 384 (Rules ed., 1951); cf. *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548-552; *Kirk* v. *Commissioner*, 179 F. 2d 619 (C.A. 1); *United States* v. *Templeton*, 199 F. Supp. 179 (E.D. Tenn.).

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1966, petitioner was found in contempt for his failure to appear before a grand jury of that court on May 31, 1966, as had been directed by the grand jury foreman at the close of his appearance before that body on May 10, 1966. The district court's order provided that if petitioner failed to appear before the grand jury on or before August 22, 1966, he would be fined $25,000, plus $1000 for each day thereafter until he appeared (Pet. App. F). A motion to vacate this order, filed by petitioner's counsel, was denied with a memorandum opinion on September 27, 1966, 262 F. Supp. 707 (Pet. App. E), and the court of appeals affirmed, 370 F. 2d 1019 (Pet. App. A).

There is in any event no occasion for this Court to review the issues which have already been carefully considered and correctly resolved by the courts below.

In April and May, 1966, two federal grand juries in the Southern District of New York were conducting investigations into the activities in the United States of an international holding company controlled by petitioner, a citizen of Switzerland (App. 6, 65, 133).[1] While petitioner was in New York City on business, he was personally served with a subpoena to appear before a grand jury on April 29, 1966. (The subpoena provided that petitioner was "not to depart the Court without leave thereof, or of the United States Attorney" (App. 9).) He appeared as directed and at the end of the session he was told by the foreman to return

[1] "App." refers to the Appendix to Appellant's Brief in the court of appeals.

on May 2 (Pet. App. G 24a) and on that day similarly directed to appear again on May 6, 1966 (Pet. App. G 26a). In order to facilitate petitioner's business convenience, his counsel worked out an arrangement with the government whereby petitioner's testimony could be expedited by examination at the United States Attorney's office (App. 129–130). This accommodation is reflected in the minutes of the May 6, 1966, session of the April Special Grand Jury where it also appears that petitioner was directed by the foreman to return on May 10, 1966 (Pet. App. G 26a–27a). When petitioner appeared on May 10, he unexpectedly requested an opportunity to make a statement before the grand jury. Since the April grand jury, in view of petitioner's prior arrangements with the government, had not allotted time for a statement from petitioner, petitioner was permitted to make his statement to the May Regular Grand Jury, which was also inquiring into related matters (Pet. App. G 21a–23a). After petitioner gave his statement, he was directed by the foreman to return on May 31, 1966—a time worked out and agreed to by petitioner, his counsel, and the government, pursuant to petitioner's request that he be permitted to go to Switzerland to obtain documents and information pertinent to the investigation (Pet. App. G 27a; App. 7, 35, 65, 130).

Petitioner did not appear on May 31, 1966, as directed. Instead, on that day he cabled the attorney who had been counseling him in connection with his appearances to have him inform the government that

petitioner did not intend to return from Switzerland (Pet. App. E 12a; App. 7, 36, 115).

On July 13, 1966, the court issued an order to show cause why petitioner should not be held in civil and criminal contempt for his failure to appear on May 31, 1966. Copies of the order and supporting affidavits were duly served on petitioner's counsel in New York and by certified mail on petitioner at his address in Switzerland. Petitioner's attorney also cabled him the entire text of the moving papers (App. 4, 10, 28–29, 131).

Petitioner discharged the attorney who had been representing him. Subsequently, after requesting and obtaining a continuance from August 1 to August 15, petitioner's new counsel withdrew from the case (App. 10–12, 66–67). On August 15, a further continuance was requested by still new counsel, and was granted as to the criminal aspect but denied as to the civil contempt. The request was made so that counsel could have further time to decide whether to undertake the representation of petitioner (App. 14). After a further adjournment was refused, counsel was invited to participate but declined (App. 27, 28). The court then proceeded with the hearing. Petitioner was found in civil contempt and ordered to appear by August 22, 1966, with a fine fixed for non-appearance.

1. Petitioner argues (Pet. 15–23) that the oral direction of the grand jury foreman to return on a certain date was not a valid "process", disobedience of which constitutes contempt under 18 U.S.C. 401. As the court below held (Pet. App. A 4a–5a), this contention is without merit. The original subpoena, ad-

mittedly valid, directed petitioner not to depart the jurisdiction of the court except by leave or with the permission of the United States Attorney. The long established practice of permitting the foreman of a grand jury to order a physically present witness to return on a date certain is a sensible and flexible method for continuing the availability of a witness. The grand jury is an arm of the court.[3] Because of this, the court of appeals correctly observed that "it would be an absurd interpretation of the rules and the power of a district court to hold that a grand jury acting through its foreman could not direct the further attendance of the witness when the witness is present before it" (Pet. App. A 5a). The validity of this conclusion is in no way undermined by the fact that petitioner was appearing before a panel other than the one he had first testified before. Moreover, petitioner and his counsel affirmatively agreed without objection to return on the date set. Petitioner was not entitled thereafter to ignore the order of the grand jury colorably valid on its face (see Pet. App. G 27a), on the ground that the adjournment was beyond the *de jure* power of that body. See *McPhaul* v. *United States*, 364 U.S. 372, 379; *United States* v. *Bryan*, 339 U.S. 323, 333; *United States* v. *United Mine Workers*, 330 U.S. 258, 290–301; *Howat* v. *Kansas*, 258 U.S. 181, 189–190.

2. Petitioner argues that since he was not personally served with the order to show cause the dis-

[3] *Levine* v. *United States*, 362 U.S. 610; *Brown* v. *United States*, 359 U.S. 41, 49; *In re Black*, 47 F. 2d 542, 544 (C.A. 2); *United States* v. *Smyth*, 104 F. Supp. 283, 291 (N.D. Calif.); *Application of United Electrical Radio & Machine Workers*, 111 F. Supp. 858, 864 (S.D.N.Y.).

trict court had no jurisdiction to find him in civil contempt (Pet. 23–29, 42–47). Petitioner was, however, personally served with the subpoena within the jurisdiction of the court and actually appeared several times before the grand jury.[4] The motion for a coercive contempt order to compel appearance was not a new proceeding; it was, rather, "ancillary to the grand jury hearing and designed as an aid to it." See *Harris* v. *United States*, 382 U.S. 162, 165. *In personam* jurisdiction was acquired with the service of the subpoena in New York. Any additional due process requirements were satisfied when actual notice was given of the ancillary civil contempt proceeding. See, *e.g.*, *Leman* v. *Krentler-Arnold Co.*, 284 U.S. 448, 452; *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418; *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. 2d 302 (C.A. 2); *Brooks* v. *United States*, 119 F. 2d 636, 644 (C.A. 9); *Tilghman* v. *Tilghman*, 57 F. Supp. 417, 418 (D.D.C.). One personally served with a subpoena cannot defeat its enforcement by thereafter crossing state or international boundaries.

3. The contempt conviction is not subject to vacation on the claim that the district court, which did not have the grand jury minutes before it, based its order on erroneous findings (see Pet. 32–42).

The district court did inaccurately state that the foreman of the April Additional Grand Jury directed petitioner to appear before the May Grand Jury on May 2, and that petitioner appeared before the May

[4] For this reason the procedures outlined in 28 U.S.C. 1783 and 1784 for service of subpoenas in a foreign country and for supporting contempt proceedings (Pet. 5–7, 42–47) are inapplicable.

Grand Jury thereafter. Actually, petitioner appeared before the April Special Grand Jury on April 29 and May 2 and 6. He was orally instructed each time as to his next appearance. On May 6 he was told to return on May 10. On May 10, petitioner was taken before the May Regular Grand Jury as an accommodation to petitioner to permit him to make a statement for the record. At the termination of that testimony, petitioner was instructed by the foreman of the May Grand Jury to return on May 31. This error in background in no way affected the basic rationale of the district court's opinion. Nor did the court of appeals affirm the order on evidence not before the district court. The original subpoena did not limit petitioner's appearance to a particular panel of the grand jury. Both courts below agreed that the essential basis for finding contempt was the conclusion that the May 10 order to return on May 31 was a lawful "process" of the court. Both courts concluded that it was immaterial that the appearances involved two different grand jury panels (Pet. App. A 6a; Pet. App. E 16a). While the district court seemed to regard the subpoena as the basis for the authority of the foreman to issue oral orders, and the court of appeals noted that the power to issue such orders could also be acquired through the witness's actual appearance before the grand jury, this was not a change in the basis of decision. The significant fact, as both courts recognized, was that the order of May 10 was a lawful process which petitioner was under a duty to obey.

4. Petitioner's own Statement of Facts (Pet. 9–10), taken in context, wholly refutes his contention that

his right to counsel was denied (Pet. 30–32). After the show cause order was served, he dismissed the attorney who had thus far been advising him in connection with his grand jury appearances, and retained another lawfirm. When that firm withdrew from the case, it notified petitioner that the hearing was set for a date ten days hence (Pet. App. E 13a). Despite this interval, on the day set for the hearing a third attorney appeared at the contempt hearing to seek a further continuance in order to decide *whether* to represent petitioner. It is important to recognize that the objective of the civil contempt proceeding was to compel petitioner to continue his testimony before an investigative grand jury. The district court plainly did not abuse its discretion in proceeding with the civil contempt proceeding after the already substantial delays.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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